


April 1, 2003

Action

MEMORANDUM

TO: County Council

FROM:  Michael Faden, Senior Legislative Attorney

SUBJECT: **Action:** Bill 36-02, Ethics – Employment Restrictions

Management and Fiscal Policy Committee recommendation: enact with amendments.

Then-Council President Silverman introduced Bill 36-02, *Ethics – Employment Restrictions*, on behalf of the County Ethics Commission on October 29, 2002. A public hearing was held on December 3, at which the only speakers were Ethics Commission Vice-Chair Steven Shaw, County Attorney Division Chief Marc Hansen, and one citizen who supported the Commission recommendation but said that it did not go far enough. See testimony, ©21-26. In the only other comment received since the hearing, a County employee (see letter, ©27-28) objected to the restrictions contained in the bill and current law.

Background/current law

Bill 36-02 was introduced to clarify certain ambiguities in the County ethics law, which are described in the attached Ethics Commission and County Attorney opinions (see ©6-11, 12-20), regarding the limits on involvement of former County employees in matters they dealt with as County employees.

Briefly, the County ethics law's current provision on post-County employment (Code §19A-13, see ©2) contains 2 restrictions on former County employees:

-- **The 10-year restriction** A former employee cannot assist any party, other than the County, in any "case, contract, or other *specific matter* for 10 years after the last date the employee significantly participated in the matter as a public employee" (§19A-13(a), emphasis added).

-- **The 1-year cutoff** A former employee cannot be employed for *one year* after leaving County employment by "any person or business that contracts with a County agency"¹ if the

¹The ethics law (§19A-4(a)) defines "County agency" to include County government (including boards and commissions appointed by the Executive or Council), the Revenue Authority, Housing Opportunities Commission, and Board of License Commissioners, and any fire department or rescue squad that receives County funds or uses County property. The term does not include Montgomery County Public Schools, Maryland-National Capital Park and Planning Commission, Washington Suburban Sanitary Commission, or Montgomery College, all of which fall under state ethics laws.

employee "significantly participated in regulating the person or business" or "had official responsibility concerning a contract with the person or business" (§19A-13(b), emphasis added). This 1-year cutoff is not limited to a specific contract or other matter, as the 10-year restriction is, but covers an employer with whom the employee had some interaction even if the future employment would not involve that particular interaction.

Subsection 19A-13(c) (see ©2, lines 16-24) defines the term "significant participation". The key phrase in this definition is "direct administrative or operating authority to approve, disapprove, or otherwise decide governmental action with respect to a specific matter".² In a recent opinion (see ©6-11) the County Ethics Commission considered how this provision would affect an employee whose job involved recommending action to a County official but who had no direct administrative or operating authority. Guided by an opinion of the County Attorney regarding the term "official responsibility" (see ©12-20), the Commission concluded that the law's post-County employment provisions would not restrict the employee in question because the County law defines significant participation more narrowly than similar provisions in state and federal ethics laws, in a way that does not cover rendering advice or recommendations (see opinion, ©8-9). In short, as summarized by Jud Garrett, counsel to the Ethics Commission, the law now applies to decision-makers, but not to *advisers* to decision-makers. Dissatisfied with being forced to reach this result (see letter, ©4, and testimony, ©21-23), the Commission submitted Bill 36-02 to make the County law more like the parallel state and federal laws. (Also see the County Attorney testimony on ©24-26.)

Issues/Committee recommendations

The Management and Fiscal Policy Committee, at worksessions held on January 23 and March 10, chose not to reconsider the central elements of the post-employment section – the 10-year and 1-year restrictions – so this memo will review the policy issues the Committee considered and their recommended amendments, which are incorporated in the bill on

1) **"Significant participation"** Bill 36-02 would expand the current law's definition of this term to cover recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. The bill deletes the language regarding "direct administrative or operating authority to approve, disapprove, or otherwise decide governmental action with respect to a specific matter". See ©2, lines 18-26. The bill also deletes the term "official responsibility" for a contract and replaces it with significantly participated in any procurement activity. The Committee agreed with the Commission that the current law is too narrow because it excludes employees who do not have final authority but nevertheless influence important decisions, thus creating potential conflicts of interest. **Committee recommendation:** rewrite this definition as proposed in Bill 36-02.

2) **Scope of 1-year cutoff** Council staff initially suggested deleting "that contracts with a County agency" on line 10 because, in our view, the 1-year post-employment cutoff was not intended to be limited to those who contract with the County but also to cover employees who regulated a particular person or business but were not involved in procurement activity. Marc

²This definition excludes "program or legislative oversight, or budget preparation, review, or adoption." This bill does not affect those exclusions.

Hansen cited the legislative history of previous amendments to this section which implied a different conclusion – that despite the term “regulating” on line 13, this provision was intended only to cover *future employment* with a person or business that *contracts with* the County. Under this interpretation an employee who regulated a given business just before leaving County service could immediately accept employment with that business as long as that business does not have a contract with the County. This interpretation would allow, for example, a former building inspector to immediately work for a builder whose buildings the inspector had just inspected if that builder does not have a contract relationship with any County agency.

Given this apparent inconsistency, and because this was a new issue that the Ethics Commission initially did not raise, the Committee decided to seek the Commission’s input before making a policy recommendation. At its March 3 meeting, the Commission supported the broader approach to this issue: to apply the restriction to businesses regulated by the County as well as those that contract with the County. The Committee agreed. **Committee recommendation:** delete “that contracts with a County agency” on line 10.

3) **Lookback** In his testimony representing the County Executive, Mr. Hansen noted that neither the bill as introduced nor the current law contains a “lookback” provision. That is, neither imposes a time limit (in effect, a statute of limitations) on when the action that gives rise to the restriction took place. For example, an employee could approve or recommend a contract 10 or 15 years ago, when that employee had no likelihood of employment with the contractor, and still be restricted from accepting an employment offer for one year after leaving County service. Mr. Hansen recommended a 1-year lookback provision because it would be identical to the 1-year cutoff period. In the Committee’s view, a lookback provision makes sense and would make the law more reasonable, but 1 year would be too short. **Committee recommendation:** specify a 3-year lookback period. (This was done by inserting on lines 11-12: during the previous 3 years.) Councilmember Denis supported this amendment although he preferred a 1 year period.

4) **Applicability/effective date** Section 2 of the bill as introduced (see ©2-3, lines 27-33) would have applied the law as amended to any action in which an employee *participates* after the bill takes effect. This means that the new, broader definition of “significant participation” would only apply to actions an employee takes after sometime this July. For other actions, the previous (current) law would perpetually apply, no matter when the employee leaves County employment. The Committee instead recommended applying the law to all post-County employment by any employee who *leaves County employment* after the bill takes effect. In effect, when combined with the lookback amendment, this provision applies the new restriction to any action the employee took during the past 3 years. The Committee preferred this approach to two other possible options: applying the law to those employees who *left County employment* before as well as after the law takes effect³ or inserting a sunset date for this provision after which the amended law would apply to any post-County employment no matter when the employee left County service or the relevant action was taken. **Committee recommendation:** rewrite §2 as shown on ©2-3, lines 27-33.

³Jud Garrett, then-counsel to the Ethics Commission, saw constitutional problems with this approach because it could impair an employee's property rights. Council staff is not sure we agree, but did not recommend this expansive an approach.

5) **Other clarifications** The Committee revised language on lines 3-4 to clarify the 10-year restriction on assisting any party on a matter the employee participated in while a County employee. The new language focuses the restriction on the specific matter, as was originally intended, rather than implying that *any employment* with the particular party is prohibited. The Committee, at Mr. Hansen's suggestion, also added or other contractual after procurement on lines 14-15 because "procurement" could be interpreted to refer only to transactions to acquire goods, services, and construction. If it is so interpreted, transactions involving real property and certain grant agreements would not be covered.

6) **Outreach** Ethics Commission members suggested that, before this bill is enacted, the Council take more steps to inform affected County employees about the bill and seek additional employee comments. The commission felt that outreach was important because amendment #2, if adopted, will significantly expand the reach of the post-employment restriction beyond county contractors. **Committee recommendation:** inform County employees in plain language of the content and effects of the bill after it is enacted.

This packet contains:

	<u>Circle #</u>
Bill 36-02 with Committee amendments	1
Letter from Ethics Commission	4
Ethics Commission opinion	6
County Attorney opinion	12
Ethics Commission testimony	21
County Attorney testimony	24
Citizen comment	27

Bill No. 36-02
Concerning: Ethics - Employment
Restrictions
Revised: 3-13-03 Draft No. 4
Introduced: October 29, 2002
Expires: April 29, 2004
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the request of the County Ethics Commission

AN ACT to:

- (1) broaden certain restrictions on post-government employment by County employees;
and
- (2) generally amend the law governing future employment of County employees.

By amending

Montgomery County Code
Chapter 19A, Ethics
Section 19A-13

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Section 19A-13 is amended as follows:

19A-13. Employment of former public employees.

- (a) A former public employee must not ~~[[accept employment]]~~ work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.
- (b) For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business ~~[[that contracts with a County agency]]~~ if the public employee significantly participated during the previous 3 years:
- (1) ~~[[significantly participated]]~~ in regulating the person or business; or
 - (2) ~~[[had official responsibility]]~~ in any procurement or other contractual activity concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).
- (c) Significant participation means [direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates] making a decision, approval, disapproval, recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. [It] Significant participation ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

Sec. 2. Applicability.

Section 19A-13, as amended by Section 1 of this Act, applies to any [[specific matter or action in which a former]] public employee [[significantly participates as a public employee]] who leaves public employment after this Act takes effect.

[[Section 19A-13, as it existed before it was amended by Section 1 of this Act, applies to any other specific matter or action in which a former public employee significantly participated as a public employee before this Act took effect.]]

Approved:

Michael L. Subin, President, County Council

Date

Approved:

Douglas M. Duncan, County Executive

Date

This is a correct copy of Council action.

Mary A. Edgar, CMC, Clerk of the Council

Date



Gov't

RECEIVED COUNCIL

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ETHICS COMMISSION

July 25, 2002

JUL 26 P1:52

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Commissioners

Elizabeth K. Kellar
Chair

Steven A. Shaw

Vice Chair

Jerome Joseph

Richard N. Reback

Veronique M. Silverman

Commission Staff

Barbara M. McNally

Executive Secretary

Synn Launer

Administrative Assistant

Steven A. Silverman, President
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

RE: Post-County Employment Restrictions Legislation

Dear Mr. Silverman:

Enclosed is a copy of a proposed bill that would broaden the post-County employment restrictions of the Montgomery County Ethics law.

The proposed legislation grows out of the Commission's consideration of a recent advisory opinion request in which it came to the attention of the Commission that Montgomery County's post-County employment restrictions are relatively narrow. For example, unlike comparable federal and State law, the County's prohibition on the acceptance of employment by a private party in a case, contract, or other specific matter for 10 years after the last date the former County employee significantly participated in the matter as a County employee is limited to former County employees who had direct administrative or operating authority to approve, disapprove or otherwise direct government action in the matter, and does not apply to a former County employee who gave advice to a County decision-maker concerning the matter.¹ In the Commission's view, the concerns that underlie the federal, State and County post employment restrictions are identical, and the County's restrictions, therefore, should apply as broadly as the State and federal restrictions.

As is the Commission's usual practice, we have submitted the proposed bill to the County Executive. He has indicated that the Commission may, on its own, submit the bill to the Council for consideration and possible action.

We would be happy to respond to any questions you might have about the proposal.

Thank you for your consideration.

Sincerely,

Elizabeth K. Kellar

Elizabeth K. Kellar,
Chair

MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

The Montgomery County Public Ethics Law permits any person who is subject to that law (or certain other County ethics provisions) to ask the Ethics Commission for an advisory opinion on the meaning or application of the Ethics Law (or those other ethics provisions) to that person.¹

This is an advisory opinion on the meaning, applicability and scope of the "post-county employment restrictions" of Section 19A-13 of the Public Ethics Law, as they will apply to an individual who, although still employed by the County, will soon begin the process of exploring options for "after County" employment. The requester seeks general advice based on a general description of the requester's responsibilities.

Material Facts

According to the requester:

[T]he essence of my job is to help [a County official] in the development and implementation of [the official's] agenda. In practice, the job has evolved into a variety of roles, including representing the [official] at hearings and meetings; advising the [official] on [various matters including] policy matters; acting as a liaison between [the official] and certain of [the official's] subordinates; working with [other] officials at the federal, state, and local level; serving as a "troubleshooter"; and, drawing on my ... background,

¹See MONT. CO. CODE §19A-7(a). Unless the requester authorizes disclosure, the Commission must keep the name of the requester confidential. *Id.* Nevertheless, the Commission must: (a) publish each opinion when it is issued unless the Commission finds that the privacy interest of a public employee or other person clearly and substantially outweighs the public's needs to be informed about Commission actions; (b) at least annually must publish a list of all unpublished opinions, with the reason why each opinion was not published; and (c) take all reasonable steps consistent with making the opinion useful for public guidance to keep confidential the identity of any person who is affected by the opinion request. §19A-7(b).

to decide what action the County will or will not take on any particular matter. I do not have the authority ... to regulate the private sector, enter into a contract, or direct other employees. Moreover, from the outset, the [official whom I serve] has made it clear that I have no authority to set policy. Rather, my role has been to advise [that official] to work with those who have authority to act on matters that require the involvement of the [official].

* * *

[M]y responsibilities are to monitor, report, and advise the [official] on the actions of others. I do not have "direct administrative or operating authority to approve, disapprove, or otherwise decide government action." To the extent that I have conveyed to others ... the views, positions, policies, and directives of the [official I serve], I have done so on [the official's] behalf, as the [official's] representative, and at [the official's] direction.

Under these circumstances, I question if my responsibilities fall within the parameters of "significant participation" or "official responsibility concerning a contract." If they do not, it would appear that Section 19A-13 would not apply to me. I respectfully request an advisory opinion from the Commission on whether the limitations of Section 19A apply to me.

Applicable Law

The "after-county" employment provisions of the Montgomery County Public Ethics Law, which are entitled "Employment of former public employees," provide as follows:

(a) [*The 10 Year Prohibition.*] A former public employee must not accept employment or assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee *significantly participated in the matter* as a public employee.

(b) [*The 1 Year Prohibition.*] For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business that contracts with a County agency if the public employee:

- (1) *significantly participated in regulating* the person or business;
or
(2) had *official responsibility concerning a contract* with the person or business (except a non-discretionary contract with a regulated public utility).²

(c) *Significant participation* means *direct* administrative or operating *authority to approve, disapprove, or otherwise decide government action with respect to a specific matter*, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.³

Analysis

As ordinarily and popularly understood, the term “*significant participation*” would include making recommendations, rendering advice, conducting investigations, and other such activities. Indeed, in construing the term “*participated significantly*” in the post-state-employment provision of the Maryland Public Ethics Law,⁴ the State Ethics Commission has read the term “*participation*” “to include acting or failing to act in one’s official capacity, ‘personally and substantially, through approval, disapproval, decision, *recommendation, the rendering of advice, investigation or otherwise.*’”⁵ This ordinary and popularly understood meaning also is expressly stated in federal post-government-employment restrictions,⁶ and, absent more, would be consistent with Montgomery County’s express intent that its Public Ethics Law be liberally construed to accomplish its broad policy goals.⁷ However, the

² § 19A-13. (Emphasis added.)

³ § 19A-13(c). (Emphasis added.)

⁴ The State Ethics Law prohibits a former state official or employee from assisting or representing a party “in a case, contract, or other specific matter for compensation if: (i) the matter involves State government; and (ii) the former official or employee *participated significantly* in the matter as an official or employee.” § 15-504 (d) (1). (Emphasis supplied.)

⁵ Opinion No. 82-24 (quoting Opinion 80-17), XVIII COMAR 434, 436 (1982). (Emphasis added.)

⁶ See, e.g., 18 USC § 207 (a)(1)(B) and (i)(2) (For the purposes of a federal statutory restriction on former officers and employees of the executive branch who “participated personally and substantially” in a particular matter as a federal officer or employee, “the term ‘*participated*’ means an action taken as an officer or employee through decision, approval, disapproval, *recommendation, the rendering of advice, investigation, or other such action*”). (Emphasis added.)

⁷ See § 19A-2 (d).

Montgomery County Ethics law defines the term "*significant participation*," and in contrast to the State Ethics Law or the Federal statute that defines "participation" broadly, the County's definition of "significant participation" is relatively narrow:

*Significant participation means direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.*⁸

According to the requester, he or she does not have the authority to approve, disapprove, or otherwise decide government action with respect to any specific matter. It necessarily follows, therefore, that the requester, in the performance of his or her duties, does not *significantly participate* in any matter as that term is narrowly defined for the purposes of the post-county employment provisions of the County Ethics Law. Consequently, the requester is not subject to § 19A-13(a)'s ten-year prohibition on becoming employed by or assisting any party in a case, contract, or other specific matter. For the very same reason, § 19A-13(b)(1)'s one-year prohibition of any employment understanding or arrangement with any person or business that contracts with a County agency would not apply to the requester because he or she has not *significantly participated* in *regulating* any person or business.

However, unlike the "*significantly participated*" standard for both the ten-year restriction and the 13(b)(1) one-year restriction, the standard for the 13(b)(2) one-year restriction is whether the former public employee had "*official responsibility*" concerning a contract with the person or business. Furthermore, unlike the term "*significant participation*," the term "*official responsibility*" is not defined in the Montgomery County Ethics law. Therefore, unless there was a contrary legislative intent, "*official responsibility*" is to be given its ordinary meaning for the purposes 13(b)(2), and that meaning would include the responsibility to advise, recommend, and investigate.⁹

⁸ MONTGOMERY COUNTY CODE §19A-13(c). (Emphasis added.)

⁹ See, e.g., *U.S. v. Hathaway*, 534 F.2d 386 (1st Cir. 1976), *cert. denied* 429 U.S. 819 (1976). (The Executive Director of a redevelopment authority who had power to render advice and assistance to the Authority had "official responsibility" within the meaning of the Massachusetts bribery statute.) See also, State Ethics Commission Opinion No. 82-25 (quoting Opinion 80-17) ("Participation includes acting or failing to act in one's official capacity, 'personally and substantially, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.'")

Because it is a significant question of statutory construction, we have sought and received legal advice from our legal counsel, the Office of the County Attorney, on the meaning of the term "*official responsibility*" as used in this § 19A-13(b)(2). That Office has advised:

The term "*official responsibility*," as used in the post-county-employment provision of the Montgomery County Public Ethics Law, means direct administrative or operating authority to approve, disapprove, or otherwise direct government action, and does not include giving advice, making recommendations, or participating as a member of a County team that negotiates with the private sector on "special projects."¹⁰

CONCLUSION

Applying the applicable law to the pertinent facts as presented by the requester, the Commission concluded, based on the analysis set forth above and the legal advice contained in the attached Opinion of the Office of the County Attorney, that the requestor is not subject to the post-county-employment restrictions of § 19A-13.

The Commission noted, however, that should the requester's responsibilities change before he or she leaves county service or should the material facts be other than presented in his or her request, this Opinion is not binding. Furthermore, as is its practice when giving "outside employment" and "post-county-employment" advice, the Commission reminded the requester that the Ethics Law's prohibits: (1) a public employee from intentionally using the prestige of one's public employment for private gain or the gain of another;¹¹ (2) a public employee or former public employee from disclosing confidential information relating to or maintained by a County agency that is not available to the public;¹² and (3) a public employee or former public employee using confidential information for personal gain or the gain of another.¹³

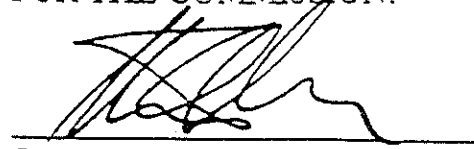
¹⁰ See May 28, 2002 memorandum from Associate County Attorney Garrett, through Marc P. Hansen, Chief General Counsel, Office of the County Attorney, to Elizabeth Kellar, Chair, Montgomery County Ethics Commission (a copy of which is attached to this Advisory Opinion).

¹¹ MONT. CO. CODE, § 19A-14(a) ("A public employee must not intentionally use the prestige of office for private gain or the gain of another.")

¹² MONT. CO. CODE, § 19A-15(a) ("Except when authorized by law, a public employee or former public employee must not disclose confidential information relating to or maintained by a County agency that is not available to the public.")

¹³ *Id.* ("A public employee or former public employee must not use confidential information for personal gain or the gain of another.")

FOR THE COMMISSION:

A handwritten signature in black ink, appearing to read 'S. Shaw', is written over a horizontal line.

Steven A. Shaw
Vice-Chairman

June 6, 2002



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

OPINION

May 28, 2002

TO: Elizabeth Kellar, Chair
Montgomery County Ethics Commission

THROUGH: Marc P. Hansen
Chief General Counsel

FROM: Judson P. Garrett, Jr.
Principal Counsel for Opinions and Advice

RE: Meaning of the Term "Official Responsibility"

We are responding to your request for our opinion concerning the construction of the term "official responsibility" as used in the post-county-employment provisions of the Montgomery County Public Ethics Law (Montgomery County Code, § 19A-13(b)).

QUESTION ADDRESSED

Does the term "official responsibility," as used in the post-county-employment provisions of the Montgomery County Public Ethics Law, include giving advice, making recommendations, or participating as a member of a special projects contract negotiating team that is not authorized to execute or approve the contracts it negotiates?

ADVICE

The term "official responsibility," as used in the post-county employment provisions of the Montgomery County Public Ethics Law, means direct administrative or operating authority to approve, disapprove, or otherwise direct government action, and does not include giving advice, making recommendations, or serving as a member of a negotiating team..

APPLICABLE LAW

The "post-county" employment provision of the Montgomery County Public Ethics Law, entitled "Employment of former public employees," provides as follows:

(a) A former public employee must not accept employment or assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee *significantly participated* in the matter as a public employee.

(b) For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business that contracts with a County agency if the public employee:

(1) *significantly participated* in regulating the person or business; or

(2) had *official responsibility* concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).

(c) *Significant participation* means *direct* administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.¹

ANALYSIS

1. Statutory Construction Principles.

A statute is the written will of the legislative body that enacted it. The cardinal rule for interpreting a statute, therefore, is "to ascertain and carry out the real legislative intent,"² and the beginning point for divining legislative intent is the language of the law itself.³ "[W]hat the [legislative body] has written in an effort to achieve a goal is a natural ingredient of

¹ MONT. CO. CODE §19A-13. (Emphasis added.)

² *State v. Pagano*, 341 Md. 129, 133 (1996).

³ *Morris v. Prince George's County*, 319 Md. 597, 603 (1990).

analysis to determine that goal.”⁴ Therefore, “the words used are to be given ‘their ordinary and popularly understood meaning, absent a manifest contrary legislative intention.’”⁵

Nevertheless, ascertainment of the meaning apparent on the face of a statute need not end the inquiry.⁶ “Although the words of a statute are the starting point for ascertaining the legislative intent, they must not be read in a vacuum but should be considered in light of other manifestations of legislative intent.”⁷ “The ‘meaning of the plainest language’ is controlled by the context in which it appears.”⁸ “Thus, we are always free to look at the context within which statutory language appears.”⁹ “Even when the words of a statute carry a definite meaning, we are not ‘precluded from consulting legislative history as part of the process of determining the legislative purpose or goal’ of the law.”¹⁰ We may [therefore,] consider other “external manifestations” or “persuasive evidence.” These include the cause or necessity of the law;¹¹ its objectives and purposes;¹² its history;¹³ its relationship to earlier and subsequent legislation;¹⁴ prior and contemporaneous statutes;¹⁵ and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which the particular language is read in a given case.¹⁶ “This enables us to put the statute . . . in its proper context and thereby avoid unreasonable or illogical results that

⁴ *Kaczorowski v. Baltimore*, 309 Md. 505, 513 (1987).

⁵ *Privette v. State*, 320 Md. 738, 744 (1990) (quoting *In re Arnold M.*, 298 Md. 515, 520 (1984)).

⁶ *Kaczorowski*, 309 Md. at 514.

⁷ *In re Douglas P.*, 333 Md. 387, 393 (1994).

⁸ *Kaczorowski*, 309 Md. at 514 (quoting *Guardian Life Ins. Co. of America v. Ins. Comm'r*, 293 Md. 629, 642 (1982)).

⁹ *Morris*, 319 Md. at 603-04.

¹⁰ *Id.* (citations and footnote omitted).

¹¹ *Smith v. Higinbotham*, 187 Md. 115, 125 (1946).

¹² *Clark v. State*, 2 Md. App. 756, 761 (1968).

¹³ *Welsh v. Kuntz*, 196 Md. 86, 93 (1950).

¹⁴ See n.24, *infra*.

¹⁵ *Department of Tidewater Fisheries v. Sollers*, 201 Md. 603, 611 (1953).

¹⁶ *Kaczorowski*, 309 Md. at 514-515.

defy common sense.”¹⁷

2. *History of Montgomery County's Post-County Employment Restrictions.*

Montgomery County's post-county-employment restrictions are rooted in a 1978 amendment to what has become popularly known as the Montgomery County Procurement Law.¹⁸ That legislation created an “Ethics in Public Service and Contracting” title (now “Contracts, Procurement Matters and Public Ethics”) of the County Code that, among other things, imposed the following restrictions on former county employees:

(1) It shall be unlawful for any former public employee to knowingly act as broker, attorney, agent, representative or employee, for anyone other than the County in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, grant, claim, controversy, charge, or other particular matter involving a contract where the County is a party or directly or substantially interested, and *in which he or she participated personally and substantially as a public employee or was the subject of his or her official responsibility*. As used herein, the term “*official responsibility*” means direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, *to approve, disapprove, or otherwise direct government action*.

(2) It shall be unlawful for any former public employee to enter into any type of express, implied or tacit understanding or arrangement with any person who is a contractor for a period of one year following the effective date of the public employee's termination from government employment, if the employee personally and substantially participated in the regulation or control of such person or had *official responsibility concerning a contract* with such person.¹⁹

In 1983, the County enacted legislation that created its first comprehensive Public Ethics Law. That legislation also repealed and reenacted, with amendments, the Ethics in Public

¹⁷ *Adamson v. Correctional Medical Services, Inc.*, 359 Md. 238, 251-52 (2000) (quoting *Sinai Hospital of Baltimore v. Dept. of Employment and Training*, 309 Md. 28, 40 (1987)).

¹⁸ MONT. CO. CODE Ch. 11B (“Contracts, Procurement Matters and Public Ethics”).

¹⁹ 1978 L.M.C., ch. 22 § 2 (Bill No. 20-77)(codified at MONT. CO. CODE § 11B-51 (b))(effective June 1, 1978). (Emphasis added.)

Service and Contracting provisions.²⁰ In pertinent part, the comprehensive Public Ethics Law contained the following post-county employment restrictions:

(1) A former official or employee may not assist or represent a party other than the County or an agency, for compensation in a case, contract or other specific matter involving these entities if that matter is one in which he significantly participated as an official or employer. *Significant participation* includes direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subdivisions, to approve, disapprove or otherwise direct government action with respect to the matter.

(2) A former official or employee may not enter into any type of express, implied or tacit understanding or arrangement with any person or business entity, other than the County or an agency, who is a contractor with the County or an agency for a period of one year following the effective date of termination from government employment, if the employee personally and substantially participated in the regulation or control of such person or business entity or had official responsibility concerning a contract with such person or business entity.²¹

Therefore, as a result of the 1983 Act, the term "*official responsibility*" was defined in the post-county employment restrictions of the Ethics in Public Service and Contracting title (Title 11B)²² and the term "*significant participation*" was defined in the post-county employment restrictions of the Public Ethics title (Title 19A).²³

Although the 1983 Act did not amend the post-county-employment restrictions of the "Ethics in Public Service and Contracting" title, nevertheless, those provisions were set forth in the Act (apparently for general context purposes), and they: (1) involved the same subject

²⁰ See 1983 LAWS OF MONTGOMERY COUNTY, Ch. 1 (Bill 70/75-81)(adding "a new Chapter 19A, title 'Ethics' to the Montgomery County Code, 1972, as amended, for the purpose of establishing a public ethics law for Montgomery County")(effective January 1, 1983).

²¹ MONT. CO. CODE (1972, as amended), § 19A-8(e). § 11B-52(b) (1).

²² "*Official responsibility*" means "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government action."

²³ "*Significant participation*" includes "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subdivisions, to approve, disapprove or otherwise direct government action with respect to the matter."
§ 19A-8(e)(1).

matter as the new and more general Public Ethics Law's post-county employment restrictions; (2) had a common purpose with the Public Ethic Law's post-county employment restrictions; (3) were not inconsistent with the Public Ethic Law's post-county employment restrictions; and (4) formed part of the same overall system of applying substantially identical ethical restraints to post-county employment. The post-county employment restraints of the two titles, therefore, are to be read *in pari materia* and construed harmoniously, each in light of the other, consistent with their common general object and scope.²⁴ For these reasons, we conclude that the term "*official responsibility*" as used in the Ethics title was intended to have the same meaning as in the then "Ethics in Public Service and Contracting" title.

In 1990, the Montgomery County Public Ethics Law was extensively revised.²⁵ In pertinent part, the post-county employment provisions of §19A-8(e) were moved to new § 19A-13, the language of the those provisions was rewritten²⁶, and the previous lifetime ban on a county employee ever working on a matter in which he or she had significantly participated as a County employee was reduced to a 10 year ban. In addition, the 1990 Act repealed the post-county employment provisions of the Procurement law—apparently reflecting an understandable legislative decision that there was no need for substantially similar post-county-employment provisions in both the Ethics Law and the Procurement Law.

²⁴ Statutes that relate to the same thing or general subject matter, and are not inconsistent with each other are *in pari materia*, and should be construed together so that they will harmonize with each other and be consistent with their general object and scope, even though they were passed at different times and contain no reference to each other. See *State v. Thompson*, 332 Md. 1, 7 (1993) ("when we are called upon to interpret two statutes that involve the same subject matter, have a common purpose, and form part of the same system, we read them *in pari materia* and construe them harmoniously"); *GEICO v. Insurance Comm'r*, 332 Md. 124, 132 (1993) (where the statute to be construed is a part of a statutory scheme, the legislative intention is determined by considering it in light of the statutory scheme); *Subsequent Injury Fund v. Chapman*, 11 Md. App. 369, 375 (1971), ("Statutes which relate to the same thing or general subject matter, and which are not inconsistent with each other are *in pari materia*, and should be construed together so that they will harmonize with each other and be consistent with their general object and scope, even though they were passed at different times and contain no reference to each other. [Citations omitted.] Consistent with this established rule of statutory construction, we think all Sections of the Workmen's Compensation Law (Article 101) must be read and considered together in arriving at the true intent of the Legislature, as they form part of a general system; indeed, the rule has been applied by the Court of Appeals in interpreting the Motor Vehicle Code (Article 66 ½), *May v. Warnick*, *supra*; the Retail Sales Tax Act (Article 81), *Comptroller v. Atlas General Industries*, 234 Md. 77; the Defective Delinquent Law (Article 31B), *Height v. State*, 225 Md. 251; and the Alcohol Beverages Code (Article 2B), *State v. Petrushansky*, 183 Md. 67").

²⁵ See 1990 LAWS OF MONTGOMERY COUNTY, Ch. 21 (Bill 33-89) (effective April 26, 1990).

²⁶ For example, as introduced and enacted, the bill changed the verb "*includes*" to the more limited term "*means*" in the definition of "*significant participation*," i.e., "[s]ignificant participation *means* direct administrative or operating authority to approve, disapprove, [etc.]."

The legislative history of the 1990 legislation reflects a concern that the post-county-employment provisions of the Ethics Law be appropriately tailored. According to a report to the County Council:

"Significant participation" is defined at [page] 48/[lines] 1-8. At the last worksession, the Council asked staff to clarify this definition to make more explicit the kinds of oversight that do not fall with the definition, especially as it applies to Councilmembers and legislative staff.²⁷

In response to this legislative direction, the definition of the term "*significant participation*" was changed in two ways: (1) the verb "*decide*" was changed to the more limited verb "*direct*;"²⁸ (2) "program or legislative oversight, or budget preparation, review, or adoption" were excluded from the definition.²⁹

In addition, the minutes of the January 14, 1990, meeting of the County Council reflect a suggestion by the Ethics Commission that the one year prohibition be broadened, and the defeat of a motion "along the lines suggested by the Commission":

Mr. Hansen, on behalf of the Ethics Commission, directed the Council's attention to the language . . . concerning the employment prohibition which applies to former public employees. He said that the Ethics Commission is concerned about the language which prohibits for one year after the effective date of termination from County employment a former public employee from being employed by a business that contracts with a County agency. Mr. Leggett noted that the exceptions provided on page 48, lines 9-12, address this issue. Mr. Potter suggested various revisions to this section of the bill along the lines suggested by the Ethics Commission. *During discussion, Councilmembers Crenca and Gudis expressed concern about broadening the language as suggested Mr. Potter, with Ms. Crenca questioning the ability to enforce employment prohibitions if the language is broadened.* Mr. Potter moved to amend the language on page 48, lines 7-11, as follows:

. . . [that contracts with a County agency if] for which he: (1)

²⁷ December 5, 1989, Memorandum to County Council from Michael Faden, Senior Legislative Attorney and Elizabeth Beninger, Legislative Attorney, pp. 2-3.

²⁸ "Significant participation means direct administrative or operating authority to approve, disapprove, or otherwise [*direct*] decide government action with respect to a specific matter" Bill 33-89, lines 14 - 19 (p. 48).

²⁹ "It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption." *Id.*, lines 19-21.

significantly participated in regulating [the person or business;] or (2) had official responsibility concerning a contract [with the person or business].³⁰

There was no second to Mr. Potter's motion.

Thus, the post-county-employment restriction was amended to its current form:

(a) A former public employee must not accept employment or assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee *significantly participated* in the matter as a public employee.

(b) For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business that contracts with a County agency if the public employee:

(1) *significantly participated* in regulating the person or business; or

(2) had *official responsibility* concerning a contract with the person or business (except a non-discretionary contract with a regulated public utility).

(c) *Significant participation* means *direct* administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.³¹

Against this background, it would be unreasonable and illogical to construe the scope of the term "*official responsibility*" to now exceed the scope of the term "*significant participation*." Prior to the 1990 Act, the statutory definitions of the two terms (one in Title 11B and the other in Title 19A) were substantially the same, and the two clearly were

³⁰ Minutes of the December 5, 1990, meeting of the Montgomery County Council, p. 14, (Subject: Emergency Bill No. 35-89, Public Ethics--Revision). (Emphasis added.)

³¹ MONT. CO. CODE § 19A-13. (Emphasis added.)

intended to be read *in pari materia* and as conterminous in scope.³² And nothing in the 1990 legislation suggests that it was intended to result in one term being broader in scope than the other. Therefore, in the context of the full legislative history of Montgomery County's post-government employment restriction, we advise that "*official responsibility*," as used in the Public Ethics Law, should be given the same meaning as it formerly had in the "Ethics in Public Service and Contracting" title, and should be construed to be substantially the same in scope as the term "*significant participation*" as clarified by the 1990 Act.

In sum, "*official responsibility*" means "having direct administrative or operating authority to approve, disapprove, or otherwise direct government action," and, therefore, does not include such functions as giving advice, making recommendations, or participating as a member of a County team that negotiates with the private sector on "special projects," but is not authorized to execute or approve the resulting contract.

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³² Indeed, the only apparent reason for the use of two different terms to express the same restraint was that the term "*significantly participated*" was deemed to be a more appropriate description of the activities involved in the *regulation* of a person or business, and "*official responsibilities*" a more appropriate description of the same kinds of activities when they relate to a *contract* with a person or business.

#7
Add on

Bill 36-02; Ethics - Employment Restrictions

ETHICS COMMISSION TESTIMONY

Steven A. Shaw, Vice Chair
Ethics Commission
December 3, 2002

Mr. President, Members of the County Council, good afternoon. My name is Steven Shaw. I am the Vice Chair of the County Ethics Commission, and am presenting these comments on Bill 36-02 on behalf of the Commission. I thank you for this opportunity to comment. The Bill as proposed would clarify the portion of the County Ethics Law dealing with restrictions on employment of former County employees.

The need for this legislation came to our attention last spring when the Commission was asked by a County employee to issue an Advisory Opinion as to the outside employment he could seek following his planned resignation. He stated in his request that he was an advisor to a County official, and as such had no authority to make decisions. His duties, he said, were limited to making recommendations and providing advice.

Because of the unique wording of the County Ethics law, the Commission concluded that there were no legal restrictions on this person's post-County employment. The Commission felt, however, that while this conclusion was legally required, it was bad policy. Providing advice and recommendations to County officials in the exercise of their authority is frequently as significant as the actual exercise of that authority. The potential for conflicts of interest is the same. We also noted that both the federal and state ethics laws restrict the post-government employment of not only those who made decisions, but also those who provide advice and make recommendations. Extending the County's restrictions to include former employees who provide advice would prevent

serious conflicts of interest, and would conform the County's restrictions to those contained in the federal and state ethics laws.

In order to explain how the Bill would extend the post-County employment restrictions, I'd like to spend a minute summarizing the current law. There are 2 time-sensitive prohibitions. The first prohibits a former County employee for one year from working for a company that she "significantly participated" in regulating, or over which she had "official responsibility." The second one prohibits the former employee for a period of 10 years from working for a company on matters the employee "significantly participated" in while she was a County employee.

The County Attorney advised the Commission that although the term "official responsibility," is not defined in the Law, it has the same meaning as does the term, "significantly participated." The key to the scope of the post-employment restriction is, therefore, the definition of the term, "significant participation." The County Ethics law currently defines that term to include only those persons having the "*authority to...decide government action.*"

Bill 36-02 would not change either the one-year or the ten-year prohibitions. It would only revise the definition of "significant participation" to include those making recommendations and rendering advice, and would eliminate the reference to the term, "official responsibility" as being redundant.

Finally, I understand that Mr. Hansen will be presenting comments on this Bill, on behalf of the County Executive. While I am advised that the County Executive generally supports this legislation, the Council is asked to consider additional amendments to the Ethics Law that would include a "look backward" provision in the one-year prohibition

contained within the current law. I personally have no objection to such a provision. I cannot speak on behalf of the Ethics Commission on this proposal, however, until such time as the Commission has had an opportunity to review it.

I would be happy to answer any questions the Council may have. Thank you.

Bill 36-02; Ethics—Employment Restrictions

COUNTY EXECUTIVE TESTIMONY

Marc P. Hansen, Chief, Division of General Counsel
Office of the County Attorney
December 3, 2002

Mr. President, Members of the County Council, good afternoon. My name is Marc Hansen. I am with the County Attorney's Office, and I am presenting these comments concerning Bill 36-02 on behalf of the County Executive. The County Executive generally supports this legislation which strengthens the County's ethics law.

Bill 36-02 proposes to amend the ethics law to prohibit a former public employee from accepting, for a period of one year after leaving County service, employment with a business that contracts with a County agency if the public employee "significantly participated" in any procurement activity concerning that business. This bill intends to strengthen the current law by expanding the class of public employees subject to this limitation on future employment. Under current law, the one year ban only applies to a specific employer if the public employee exercised "official responsibility" over a contract with that employer. Bill 36-02 leaves unchanged the current one year ban on working for a specific employer if the public employee "significantly participated" in regulating that employer.

This one year ban on future employment is intended to address what some term the "revolving door" problem. A County employee who leaves County service and immediately goes to work for a business that the employee was in a position to benefit as a government official raises a reasonable concern in the public's mind that the employee might have given preferential treatment to that business. Therefore, strengthening the one year ban on future

employment with certain potential employers will enhance public confidence that government officials will carry out their duties in an impartial manner—a goal that the County Executive supports.

But by expanding the class of employees to which this revolving door policy applies, Bill 36-02 highlights a concern regarding whether the restrictions being imposed on County employees who seek employment opportunities after leaving County service are in fact reasonable. Placing unreasonable restrictions on obtaining employment after leaving County service may have an adverse impact on the ability of the County to recruit and retain qualified employees to administer its procurement system and its regulatory programs.

The passage of time—like the one year prohibition on future employment—tends to dissipate the reasonableness of public concern over a County employee being tempted to grant preferential treatment to a person in the hope of a potential reward of future employment. (Of course, any actual exchange of preferential treatment for future employment, if shown, would constitute bribery.)

Because Bill 36-02 imposes no time limit on when, in relation to leaving County service, the public employee participated in the procurement or regulatory matter, the legislation sweeps within its purview activities of the employee that could not be seen as raising a reasonable perception in the public that the employee may have been engaged in giving preferential treatment in the hope of obtaining a future reward of employment.

An example may help illustrate this point. Suppose a County employee assists in negotiating a contract with Company A. This negotiation occurred 15 years ago. The contract was fully performed within one year. Company A now obtains a new contract with the County

one year ago—*i.e.* 14 years after the employee negotiated with Company A and 13 years after the contract the employee helped negotiate had ended. The employee has not been involved in the most recent contract award to Company A. The employee leaves County service. As revised by Bill 36-02, the ethics law would prohibit the employee from obtaining employment with Company A for one year after leaving County service. (As an aside, another problem arises under these circumstances which is the ability of the employee to even recall that he or she had participated in negotiating a contract with Company A 15 years previously.)

In the case just described a one-year prohibition on future employment with Company A does not advance a rational policy because of the time elapsed between the employee's participation in the matter and the employee leaving County service. Again, the County ethics law should be strong, but on the other hand it should not unfairly restrict the ability of its employees to obtain future employment.

Therefore, the Council should consider amending Bill 36-02 to prohibit a former employee from accepting employment, for a period of one year, with a business that contracts with a County agency if the employee "significantly participated within one year of leaving County employment" in any procurement or regulatory activity concerning that person. Because the existing one year waiting period after leaving County service has long been seen as a reasonable assurance to the public that County officials are acting impartially, a insertion of a one year "look backward" provision should be seen as the appropriate standard as well.

The County Executive looks forward to working with the Council on this important legislation. If the Council has any questions regarding this testimony, I would be happy to try to answer them. Thank you.

BILL 36-02

Richard Dimont
115 Franklin Ave.
Silver Spring, MD 20901

MF
JF

March 7, 2003

001387

Council President, Michael L. Subin
Montgomery County Council
COB
100 Maryland Avenue
Rockville, MD 20855

Re: Bill 36-02 Ethics, Employment Restrictions

Dear Council President, Michael L. Subin:

As you know, I am a Montgomery County employee and have been one for 30 years. I am proud of my service to the County and to its residents and will feel that way long after I retire from the County.

However, I am very concerned about content of Bill 36-02 sent to the Council by the Ethic Commission. This Bill effectively extends the 'look-back period' for County Employees seeking employment when they leave the County. I feel this extension is unwarranted and excessive.

Followed to its logical conclusion, restaurant inspectors will never be employable by restaurants in the County, building inspectors will never be employed by builders and so forth. On a higher level, professionals would be barred from going to work as consultants working with the county and attorneys will never be able to go to work for firms that represent clients against the County.

In the above examples, County employees would essentially have to exile themselves to other jurisdictions in an effort to find meaningful employment. This, I fear, would hasten a 'brain-drain' of the County's most talented people, or even deter them from seeking County employment in the first place, as Marc Hansen stated in his November 12, 2002 response to this bill.

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March 6, 2003

Furthermore, there is no ethical equivalent of this bill to prevent the reverse from happening. In fact, people from the private sector come to the County, rise to levels of authority, and administer contracts involving their former employer. This condition, as you know, already exists.

Bill 36-02 would control the lives of County employees long after they leave the County. In addition, the 'evil' the bill is intended to reconcile is not at all clear nor does it promote a rational and defensible policy. It 'unfairly restricts' individual rights to obtain employment far longer than is reasonable or prudent (Hansen).

I feel that enacting Bill 36-02 would be tantamount to branding a scarlet letter on the foreheads of all County employees, making us unemployable in the area in which we live and the professions we choose. In short, it limits our marketability in a highly competitive job market, not because of our talents, but because of a groundless fear of the unknown.

In conclusion, I sincerely hope you feel the same way about Bill 36-02 as I do, and quash this bill when it comes to a vote. If you need me to testify in person on this matter, I would be happy to accommodate you. Thank you for your time and consideration.

Sincerely;

A handwritten signature in black ink, appearing to read "Richard Dimont". The signature is fluid and cursive, with a large, stylized "R" and "D".

Richard Dimont